

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

EMERSON LESLIE,

Petitioner,

vs.

D. W. NEVEN, et al.,

Respondents.

Case No. 2:13-cv-01989-APG-VCF

ORDER

Before the court are the petition for a writ of habeas corpus (ECF No. 8), respondents' answer (ECF No. 50), and petitioner's reply (ECF No. 51). The court finds that petitioner is not entitled to relief, and the court denies the petition.

Outside of a hotel in downtown Las Vegas, petitioner beat up a man, knocking him out and seriously injuring him. A security camera recorded the beating. The hotel manager viewed the videotape and identified petitioner as the attacker. When police arrested petitioner, he fought back. Petitioner was convicted of battery causing substantial bodily harm and assault upon an officer, respectively. Petitioner had two prior felony convictions, and the state district court sentenced him as a habitual criminal under Nev. Rev. Stat. § 207.010. Ex. 21 (ECF No. 24-24).

Congress has limited the circumstances in which a federal court can grant relief to a petitioner who is in custody pursuant to a judgment of conviction of a state court.

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, 562 U.S. 86, 98 (2011).

1 Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown
 2 that the earlier state court's decision "was contrary to" federal law then clearly established
 3 in the holdings of this Court, § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); or
 4 that it "involved an unreasonable application of" such law, § 2254(d)(1); or that it "was
 5 based on an unreasonable determination of the facts" in light of the record before the state
 6 court, § 2254(d)(2).

7 Richter, 562 U.S. at 100. "For purposes of § 2254(d)(1), 'an unreasonable application of federal
 8 law is different from an incorrect application of federal law.'" Id. (citation omitted). "A state
 9 court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded
 10 jurists could disagree' on the correctness of the state court's decision." Id. (citation omitted).

11 [E]valuating whether a rule application was unreasonable requires considering the rule's
 12 specificity. The more general the rule, the more leeway courts have in reaching outcomes
 13 in case-by-case determinations.

14 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

15 Under § 2254(d), a habeas court must determine what arguments or theories supported or, as
 16 here, could have supported, the state court's decision; and then it must ask whether it is
 17 possible fairminded jurists could disagree that those arguments or theories are inconsistent
 18 with the holding in a prior decision of this Court.

19 Richter, 562 U.S. at 102.

20 As a condition for obtaining habeas corpus from a federal court, a state prisoner must show
 21 that the state court's ruling on the claim being presented in federal court was so lacking in
 22 justification that there was an error well understood and comprehended in existing law
 23 beyond any possibility for fairminded disagreement.

24 Id. at 103.

25 Ground 1 contains multiple claims of ineffective assistance of counsel. A petitioner
 26 claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's
 27 representation "fell below an objective standard of reasonableness," Strickland v. Washington, 466
 28 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced the defendant
 such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of
 the proceeding would have been different," id. at 694. "[T]here is no reason for a court deciding an
 ineffective assistance claim to approach the inquiry in the same order or even to address both
 components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

The Sixth Amendment does not guarantee effective counsel per se, but rather a fair
 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.

1 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell
 2 below an objective standard of reasonableness alone is insufficient to warrant a finding of
 3 ineffective assistance. The petitioner must also show that the attorney's sub-par performance
 4 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability
 5 that, but for the attorney's challenged conduct, the result of the proceeding in question would have
 6 been different. Id. at 694. "A reasonable probability is a probability sufficient to undermine
 7 confidence in the outcome." Id.

8 Establishing that a state court's application of Strickland was unreasonable under § 2254(d)
 9 is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly
 10 deferential," . . . and when the two apply in tandem, review is "doubly" so The
 11 Strickland standard is a general one, so the range of reasonable applications is substantial.
 12 Federal habeas courts must guard against the danger of equating unreasonableness under
Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is
 not whether counsel's actions were reasonable. The question is whether there is any
 reasonable argument that counsel satisfied Strickland's deferential standard.

13 Harrington v. Richter, 562 U.S. 86, 105 (2011) (citations omitted).

14 Ground 1(A) itself contains multiple claims of ineffective assistance of counsel. First,
 15 petitioner claims that counsel failed to investigate three people. On this issue, the Nevada Supreme
 16 Court held:

17 Fourth, appellant claimed that trial counsel was ineffective for failing to interview (1) T.
 18 Purifoy to determine if she actually consented to a search of her motel room where
 19 appellant's identification was obtained; (2) appellant's girlfriend, who would have
 20 impeached the victim and testified that appellant acted in self-defense to the assault charge;
 21 and (3) the victim, which would have helped counsel determine how to question him at trial.
 22 Appellant failed to demonstrate that counsel's performance was deficient or that he was
 23 prejudiced. Trial counsel testified during the evidentiary hearing that he attempted, but was
 24 unable, to contact T. Purifoy before trial. Thus, appellant failed to demonstrate that
 25 counsel's performance was deficient. Furthermore, appellant failed to demonstrate
 prejudice, as there is no support in the record for his speculative assertion that T. Purifoy
 might not have consented to the search of her motel room. Counsel also testified that he did
 not learn that appellant's girlfriend was a percipient witness until trial, at which point he
 unsuccessfully attempted to endorse her as a witness. Because appellant did not inform
 counsel before trial that his girlfriend was a witness and wished to testify, counsel was not
 deficient for failing to interview her. As to his claim regarding the victim, appellant failed
 to explain how a pretrial interview of the victim would have had a reasonable probability of
 changing the outcome of the trial. Thus, the district court did not err in denying this claim.

26 Ex. 74, at 4-5 (ECF No. 28-1, at 5-6). Counsel did testify that he was unable to locate Purifoy. Ex.
 27 57, at 30 (ECF No. 25-33, at 31). The court will discuss in greater detail below, regarding ground
 28 8, the trial court's decision not to allow petitioner's girlfriend to testify. It is sufficient to note now

1 that petitioner did not inform counsel that his girlfriend would be a useful witness until the end of
2 the first day of trial. Finally, even now petitioner has not alleged any facts showing a reasonable
3 probability that the outcome of the trial would have been different had counsel investigated the
4 victim.

5 Second and third, petitioner claims that trial counsel failed to lodge objections at the
6 preliminary hearing and to subject the state's case to adversarial testing at the preliminary hearing.
7 On these issues, the Nevada Supreme Court held:

8 First, appellant claimed that trial counsel was ineffective during the preliminary hearing
9 because counsel failed to present a defense, failed to object to the State's version of events,
10 and admitted that there was sufficient evidence as to two of the charges. Appellant failed to
11 demonstrate that counsel's performance was deficient or that he was prejudiced. Counsel
12 made objections and tested the State's case by cross-examining the witnesses about the
13 charges. Appellant failed to identify other objections that counsel should have made or how
14 further objections or actions by counsel would have changed the outcome of the
15 proceedings. . . . While counsel did concede that there was probable cause as to the charges
16 of battery of an officer and assault of an officer, appellant failed to demonstrate that he was
17 prejudiced. The district court dismissed the battery-of-an-officer charge, and the testimony
18 of two police officers regarding appellant's resistance during arrest provided probable cause
19 to bind him over on the assault-of-an-officer charge. Therefore, the district court did not err
20 in denying this claim.

21 Ex. 74, at 2-3 (ECF No. 28-1, at 3-4) (citation omitted). The jury's verdict of guilt makes harmless
22 any constitutional error in the preliminary hearing. See United States v. Mechanik, 475 U.S. 66, 70
23 (1986). See also Williams v. Stewart, 441 F.3d 1030, 1042 (9th Cir. 2006). Therefore, petitioner
24 could not have suffered any prejudice.

25 Fourth, petitioner claims that counsel infringed on petitioner's statutory right to a speedy
26 trial by filing a pre-trial habeas corpus petition. On this issue, the Nevada Supreme Court held:

27 Second, appellant claimed that trial counsel was ineffective for filing a pretrial petition for a
28 writ of habeas corpus because it forced appellant to forfeit his right to a speedy trial.
Appellant failed to demonstrate that counsel's performance was deficient or that he was
prejudiced. Appellant initially asserted his right to a speedy trial, but after discussing the
issue with the district court, he agreed to waive his right to a speedy trial so that counsel
could challenge the charges in a pretrial petition for a writ of habeas corpus. In light of
appellant's voluntary waiver, appellant failed to demonstrate that counsel acted
unreasonably in filing a pretrial habeas petition. Furthermore, appellant did not demonstrate
a reasonable probability of a different outcome at trial had counsel not filed a pretrial habeas
petition. Accordingly, the district court did not err in denying this claim.

1 Ex. 74, at 3 (ECF No. 28-1, at 4). Petitioner was not happy about it, but he did personally waive his
2 statutory 60-day speedy-trial right to let counsel file a pre-trial petition for a writ of habeas corpus.
3 Ex. 7, at 3 (ECF No. 24-10, at 4). The Nevada Supreme Court reasonably could have determined
4 that counsel did not provide ineffective assistance.

5 Ground 1(B) contains multiple claims of ineffective assistance of counsel. First, petitioner
6 claims that counsel failed to investigate the facts of the trial. This corresponds to a claim that the
7 court already has rejected in ground 1(A).

8 Second, petitioner claims that counsel failed to subject the case to adversarial testing. This
9 claim has been dismissed because it is unexhausted. ECF No. 46.

10 Third, petitioner claims that counsel failed to prepare for trial, interview, and endorse as a
11 witness Hasina Craddock, petitioner's girlfriend. This corresponds to a claim that the court already
12 has rejected in ground 1(A).

13 Fourth, petitioner claims that counsel failed to object to numerous leading questions that the
14 prosecutor asked of the victim. On this issue, the Nevada Supreme Court held:

15 Seventh, appellant claimed that trial counsel was ineffective for failing to object to the
16 State's numerous leading questions during the victim's testimony. Appellant failed to
17 demonstrate that objections by counsel would have had a reasonable probability of changing
18 the outcome of the trial, particularly given that the battery of the victim was captured on
video and the victim and the hotel manager, both of whom were familiar with appellant,
identified appellant as the attacker. Therefore, the district court did not err in denying this
claim.

19 Ex. 74, at 6 (ECF No. 28-1, at 7). Given the evidence produced at trial, the Nevada Supreme Court
20 reasonably could have concluded that petitioner had not shown prejudice.

21 Fifth, petitioner claims that counsel failed to prepare petitioner to testify. The trial court
22 advised petitioner about his right to testify. Ex. 14, at 168-70 (ECF No. 24-17, at 44-45). After the
23 trial court learned that petitioner had a previous felony conviction, the trial court advised petitioner
24 that he might be asked on cross-examination about that conviction. Ex. 16, at 5-6 (ECF No. 24-19,
25 at 3-4). Petitioner consulted with his attorney. He decided not to testify. Ex. 16, at 10-11 (ECF
26 No. 24-19, at 5). Petitioner does not allege how he would have testified if counsel had prepared
27 him for testimony. Petitioner also does not allege a reasonable probability of a different result at
28 trial had he testified, which is important given the evidence against him. The Nevada Supreme

1 Court reasonably could have concluded that petitioner had failed to demonstrate ineffective
2 assistance of counsel.

3 In ground 1(C), petitioner claims that counsel failed to object to admission of the videotape.
4 On this issue, the Nevada Supreme Court held:

5 Tenth, appellant claimed that trial counsel was ineffective for failing to object to the video
6 evidence for lack of authentication. Appellant failed to demonstrate prejudice, as he has
7 failed to support his claim with specific facts. . . . Neither the record nor appellant's factual
8 allegations indicate any issues with the authenticity of the video. Therefore, appellant failed
to demonstrate a reasonable probability that, had counsel objected to the authentication of
the video, the outcome of the trial would have been different. Accordingly, the district court
did not err in denying this claim.

9 Ex. 74, at 7 (ECF No. 28-1, at 8) (citation omitted). The hotel manager testified about the security
10 cameras and the recording equipment. He also testified that he watched a video recorded on that
11 equipment, showing petitioner attacking the victim. Ex. 14, at 112-23 (ECF No. 24-17, at 30-33).
12 Based upon that, the Nevada Supreme Court reasonably could have concluded that there were no
13 issues with the authenticity of the video and that petitioner had failed to demonstrate prejudice.

14 In ground 1(D), petitioner claims that counsel failed to object to admission of a booking
15 photograph of petitioner. On this issue, the Nevada Supreme Court held:

16 Ninth, appellant claimed that trial counsel was ineffective for failing to object to the display
17 of a prior booking photograph, which revealed to the jury that he had criminal history.
18 Appellant failed to demonstrate prejudice. At trial, an officer testified that, once he
19 discovered appellant's identification at the motel, he entered appellant's information in
20 "Crime Web" and obtained a photograph of appellant, which he then compared to the
attacker in the video. It appears that this testimony and photograph were improper
references to appellant's prior criminal activity, . . . and counsel should have objected.
Nevertheless, we conclude that the references were not prejudicial given the overwhelming
evidence of appellant's guilt. Therefore, the district court did not err in denying this claim.

21 Ex. 74, at 6-7 (ECF No. 28-1, at 7-8) (citation omitted). The Nevada Supreme Court was correct
22 that the evidence against petitioner was overwhelming. Its conclusion that petitioner suffered no
23 prejudice is a reasonable application of Strickland.

24 In ground 1(E), petitioner claims that counsel was ineffective at sentencing because counsel
25 conceded that petitioner had prior felony convictions. On this issue, the Nevada Supreme Court
26 held:

27 Twelfth, appellant claimed that trial counsel was ineffective for conceding that appellant had
28 prior felony convictions without sufficient proof submitted by the State. Specifically,
appellant asserted that counsel should have objected to the use of a conviction from

1 California to adjudicate him a habitual criminal because the State presented only court
2 minutes of that conviction and not a certified judgment of conviction. Appellant failed to
3 demonstrate that counsel's performance was deficient or that he was prejudiced. This court
4 previously rejected appellant's underlying argument on appeal from the denial of a motion
5 to correct an illegal sentence, and concluded that the State sufficiently proved appellant's
6 prior felony convictions at the time of sentencing. . . . Thus, appellant failed to demonstrate
7 that an objection by counsel had a reasonable probability of changing the outcome of the
8 sentencing hearing. Appellant also claimed that counsel failed to inform him that the State
9 had filed notice of intent to seek habitual criminal treatment, but appellant did not provide
10 any explanation as to how he was prejudiced. . . . Accordingly, the district court did not err
11 in denying these claims.

12 Ex. 74, at 8-9 (ECF No. 28-1, at 9-10) (citations omitted). The court discusses below in ground
13 2(B) the litigation on petitioner's prior conviction in California. It is sufficient to note that the
14 Nevada Supreme Court applied Strickland reasonably in determining that petitioner had not
15 demonstrated prejudice, based upon that litigation.

16 Ground 1(F) contains four claims of ineffective assistance of counsel. First, petitioner
17 claims that communication broke down between petitioner and counsel. This part of ground 1(F)
18 has been dismissed as unexhausted. ECF No. 46.

19 Second, petitioner claims that counsel violated petitioner's right to a speedy trial. This
20 claim is redundant to the claim in ground 1(A), discussed above.

21 Third, petitioner claims that counsel failed to file a motion to dismiss and a motion to
22 suppress an identification of petitioner. The record belies this claim. Counsel filed a pre-trial
23 habeas corpus petition seeking dismissal of charges for lack of evidence. Ex. 8 (ECF No. 24-11).
24 Counsel filed a motion to suppress an identification of petitioner. Ex. 11 (ECF No. 24-14).
25 Counsel did not give ineffective assistance, because counsel did what petitioner claims that counsel
26 should have done.

27 Fourth, petitioner claims that counsel should have filed a motion to sever. On this issue, the
28 Nevada Supreme Court held:

Sixth, appellant claimed that trial counsel was ineffective for failing to sever the charges of attempted murder and battery with substantial bodily harm from the charge of assault on an officer. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The offenses were properly joined because the assault, which occurred while officers were arresting appellant for attempted murder and battery of the victim, was relevant to prove appellant's identity in the attempted murder and battery offenses, and evidence of the attempted murder and battery was relevant to explain appellant's conduct during his arrest. Thus, evidence of the offenses was cross-admissible

1 to prove appellant's identity as the attacker and his consciousness of guilt when he
 2 attempted to flee from the police. . . . Accordingly, any motion to sever the charges would
 3 have been unsuccessful, and counsel cannot be ineffective for failing to file a futile motion. .
 . . Therefore, the district court did not err in denying this claim.

4 Ex. 74, at 5-6 (ECF No. 28-1, at 6-7) (citations omitted). Given that petitioner could not
 5 demonstrate that a motion to sever the charges would have been granted, the Nevada Supreme
 6 Court reasonably applied Strickland in its determination that the lack of a motion to sever was not
 7 ineffective assistance of counsel.

8 Ground 1(G) is a claim of cumulative error of ineffective assistance of counsel. Having
 9 found no error, the Nevada Supreme Court reasonably could have concluded that there was no
 10 cumulative error.

11 Reasonable jurists would not find the court's conclusions on ground 1 to be debatable or
 12 wrong, and the court will not issue a certificate of appealability for ground 1.

13 Ground 2(A) was dismissed because it was not exhausted. ECF No. 46.

14 In ground 2(B), petitioner claims that the prosecution failed to present a certified judgment
 15 of conviction of a California case in support of the argument for habitual-criminal adjudication. On
 16 this issue, the Nevada Supreme Court held:

17 Emerson contends that the district court erred by adjudicating him a habitual criminal
 18 because the documents submitted by the State did not prove that his California conviction
 19 was for a felony or that he was formally adjudicated. This contention lacks merit because
 20 the documents submitted by the State demonstrate that Emerson was convicted of a felony
 in California. And we note that neither Emerson nor his counsel challenged the California
 conviction at sentencing, and defense counsel conceded that Emerson "qualified
 numerically" for habitual criminal treatment. Accordingly, we conclude that the district
 court did not err in this regard.

21 Ex. 41, at 8-8 (ECF No. 25-15, at 8-9). Respondents are correct that the statute provides that a
 22 certified copy of a judgment of conviction is prima facie evidence of a prior conviction, but that is
 23 not the only allowable evidence of a prior conviction. Nev. Rev. Stat. § 207.016(5). The law left
 24 open the possibility that a state might not use a written judgment of conviction. The prosecution
 25 provided documents from a California state court showing that petitioner was convicted of a felony.
 26 Ex. 29 (ECF No. 24-32). The Nevada Supreme Court reasonably could have concluded that
 27 petitioner qualified for habitual criminal treatment.
 28

1 Reasonable jurists would not find the court's conclusions on ground 2 to be debatable or
2 wrong, and the court will not issue a certificate of appealability for ground 2.

3 The court dismissed ground 3 because it was redundant to ground 2(B). ECF No. 46.

4 On screening, the court dismissed ground 4 because it was a claim that the police had
5 violated the Fourth Amendment, and petitioner had a full and fair opportunity to litigate the claim in
6 state court. ECF No. 7. Reasonable jurists would not find this conclusion to be debatable or wrong,
7 and the court will not issue a certificate of appealability for ground 4.

8 The court dismissed grounds 5 and 6 because they were not exhausted. ECF No. 46.
9 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court will not
10 issue a certificate of appealability for grounds 5 and 6.

11 The court dismissed ground 7 because it alleged error in state-court post-conviction
12 proceedings, which is not addressable in federal habeas corpus. ECF No. 7. Reasonable jurists
13 would not find this conclusion to be debatable or wrong, and the court will not issue a certificate of
14 appealability for ground 7.

15 Ground 8 is a claim that the trial court violated petitioner's rights to a fair trial and due
16 process, because the trial court refused to allow Hasina Craddock, a witness endorsed late, to
17 testify.¹ On this issue, the Nevada Supreme Court held:

18 Emerson contends that the district court erred by denying his request to call a late-endorsed
19 witness to testify on his behalf and thereby denying him his constitutional right to call
20 witnesses in his own defense. . . . We review "a district court's decision to allow an
unendorsed witness to testify for abuse of discretion." . . .

21 In order to protect a defendant's constitutional rights, a strong presumption exists in favor of
22 allowing late-disclosed witnesses to testify. . . . However, the right to present testimony is
not absolute and must be balanced against "countervailing public interests." . . .

23 Emerson concedes that the witness was not timely endorsed, . . . although Emerson almost
24 certainly knew that the witness, his girlfriend, was an eyewitness. . . . Further, Emerson did
25 not inform his counsel that the witness wanted to testify until listening to the testimony of
26 almost all of the State's witnesses. . . . And, the record does not indicate that the State
anticipated the witness; thus, her testimony would have resulted in unfair surprise to the
State. . . . Under these circumstances, we conclude that the district court did not abuse its
discretion by prohibiting Emerson's late-endorsed witness from testifying. . . . Moreover,

27
28 ¹Petitioner also mentions the Equal Protection Clause of the Fourteenth Amendment, but the
ground contains no claims that he was treated differently than other similarly situated people.

1 even if the district court erred by excluding the testimony, we conclude that any error was
2 harmless. . . .


3 Ex. 41, at 2-4 (ECF No. 25-15, at 3-5) (citations omitted). The Nevada Supreme Court identified
4 the governing federal law on the subject, Taylor v. Illinois, 484 U.S. 400 (1988). Although a
5 defendant has a right to compulsory process, the trial court may preclude a witness from testifying
6 as a sanction for violating a discovery rule. Id. at 410-16. The Nevada Supreme Court accurately
7 summarized what happened at the end of the first day of trial and the start of the second day of trial.
8 See Ex. 14, at 194-95 (ECF No. 24-17, at 51), Ex. 16, at 7-9 (ECF No. 24-19, at 4). This occurred
9 not because defense counsel was deliberately not complying with the discovery rules, but because
10 petitioner himself did not inform defense counsel about the witness until after the witness had
11 watched the prosecution's witnesses testify. Petitioner was not candid with his own attorney. The
12 Nevada Supreme Court reasonably concluded under Taylor that preclusion of Craddock's testimony
13 was an acceptable sanction.

14 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court
15 will not issue a certificate of appealability for ground 8.

16 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (ECF No. 8) is
17 **DENIED**. The clerk of the court shall enter judgment accordingly and close this action.

18 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

19 Dated: March 31, 2017.

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21 
22 ANDREW P. GORDON
23 United States District Judge
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